In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5131

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, FRANK GATT and ROMEO TRONCA,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, DISTRICT JUDGE

Brief of Defendant in Error

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STATEMENT OF THE CASE

The evidence during the trial showed that the Gatt brothers, together with Charles Romeo and Romeo

Tronca, had owned and conducted the Monte Carlo Cafe in the City of Seattle, Washington, from which place they sold and distributed various kinds of intoxicating liquor, both in retail and wholesale lots; that room No. 17, of 404½ Fifth Avenue South, was the place of concealment of the intoxicating liquor which was distributed; that 404½ Fifth Avenue South was a hotel, and room No. 17 had been constructed as a cache for the liquor and at the time of the raid a large amount of whiskey was found in said room (Tr. 63); that one of the defendants in the case testified on behalf of the Government and detailed the various activities of the various defendants during the time of the conspiracy mentioned in the indictment (Tr. 34); that all of the defendants were on trial with the exception of defendant Rossi; that all of the defendants on trial were convicted.

ARGUMENT

I.

The first error assigned by plaintiff in error is the refusal of the Court to permit Mrs. Frank Gatt to testify on behalf of the defendants and cite as authority the case of *Rendleman vs. United States*, 18 Fed. 2nd, page 27, to support their contention. There is a dis-

tinctive difference between the facts in this case and the facts in the *Rendlemen* case. In the *Rendlemen* case the witness was placed upon the stand to testify on behalf of her husband, which evidence was refused by the Court, and thereafter counsel made an offer of proof as to what she would testify to. He was not permitted to make his offer of proof and exception was taken thereto. In this case counsel placed the witness upon the stand and after it was ascertained that she was the wife of one of the defendants, an objection being made by the Government, she was not permitted to testify. The Court made inquiry as to whom she was to testify for and counsel refused to state whether it was on behalf of the other defendants, or on behalf of her husband (Tr. 82). No offer of proof was made as to what she would testify to. Therefore, it cannot be said now that the defendants were prejudiced by the fact that she was not permitted to testify. The Court cannot possibly say now that any prejudicial error was committed because there is no showing that what she would have testified to would have been competent, relevant or material. The Court must have something upon which to predicate error, and in the absence of an offer of proof the Court cannot now say that the defendants' rights were prejudiced inasmuch as counsel refused to state on whose behalf she was to testify.

(Sec. 1246 C. S.; *Rendlemen vs. United States,* 18 Fed. 2nd, page 27; *Olmstead vs. United States,* 19 Fed. 2nd, page 550-552; *Sarkisian vs. United States,* 3 Fed. 2nd, page 599).

II.

Under assignment No. II, counsel has raised numerous questions of error, the first of which can be discussed under sub-heading "A."

A. There was no error in the admission of testimony found on page seven (7) of the plaintiff-in-error's brief, and found also on page seventy-six (76) of the transcript, inasmuch as the testimony there elicited was brought out on cross-examination by counsel for the defense and no exception was taken thereto. Consequently, counsel cannot be heard to complain now that it was prejudicial. The testimony found on pages eight (8), nine (9), ten (10), eleven (11) and twelve (12) and a portion of the testimony on page thirteen (13) of appellants' brief, will be found on pages sixty-four (64), sixty-five (65), sixty-six (66), sixty-seven (67), sixty eight (68) and a portion of page sixty-nine (69) of the transcript. *There was no objection made to said testimony nor exception taken,* and no assignment of error was predicated thereon.

Sarkisian vs. United States, 3 Fed. 2nd, 599. The only assignment of error covering any testimony of the witness Whitney is found on page twenty-six (26) of the transcript, at paragraph II, from which assignment one is unable to state which portion of Whitney's testimony counsel objects to. The only exception taken was on page sixty-nine (69), after which the Court instructed the jury as follows:

"THE COURT: I will state that unless the conspiracy is established between these parties, of which Rossi is a part, then the statement made by Rossi could not be construed against any of the other defendants except himself, nor can the statement itself be construed as establishing conspiracy as against the other parties, but only binds Mr. Rossi, and if a statement was made in furtherance of the conspiracy, and the conspiracy is established, then it may be construed as against all parties."

Olmstead vs. United States, 19 Fed. 2nd, 550 at 552.

Allen vs. United States, 4 Fed. 688.

WITNESS: (Continued). Mr. Rossi also stated that in 1925, a few days before the raid, he was working under the direction of the Gatts and Frank Gatt in particular, and was collecting from other bootleg-

ging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, as high as twelve thousand dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.

MR. DORE: I move that testimony be stricken and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

THE COURT: With relation to the collection of the graft money, that may be stricken. Proceed."

Counsel states, on page thirteen (13) of his brief, that the Court refused to instruct the jury, which statement is erroneous in view of the foregoing instructions heretofore set forth.

The next conversation objected to is found on page seventy (70) of the transcript, starting with the word "witness," four lines from the top of the page. That testimony was stricken by the Court at the time. (Tr. 70). Counsel's brief does not clearly set forth the exact happenings as they took place, as the Court will

find from its entire inspection of Mr. Whitney's testimony, beginning on page fifty-five (55) of the transcript and continuing through to page seventy-six (76). Most of the conversation related by Rossi to Whitney was detailed on the day of December 29, 1925. (Tr. 68), and it was not until the following day that any exception was taken to any of the testimony of Mr. Whitney. (Tr. 69). It would be necessary for the Court to take note of these facts in order to clearly understand counsel's brief.

B. Under "B" counsel has objected to the instruction of the Court as to the testimony given by Mr. Whitney of his conversation with the defendant Rossi (Tr. 28). This conversation was had without objection by counsel for the defense. It was competent as being statements of one of the co-conspirators made in furtherance of the conspiracy, and was a part of the *res gestae*, and were made prior to the termination of the conspiracy and before any arrests were made, and while Rossi was a member of the conspiracy. (Tr. 64 and 68). (See *Fur Co. vs. United States*, 7 L. Ed., at pages 450, 453), wherein the Court said:

"The opinion of the court in the present case is not less correct whether Davis was considered by the jury as having acted in conjunction with Wallace or strictly

as his agent, for we hold the law to be that where two or more persons are associated together for the same illegal purpose, *any act or declaration of one of the parties in reference to the common object and forming a part of the res gestae may be given in evidence against the others*, and this, we understand, upon a fair interpretation of the opinion before us to be the principle which was communicated to the jury."

United States vs. Olmstead, 19 Fed. 2nd, page 550.

However, any view that the Court may take of the matter, the defendant could not possibly be prejudiced by reason of the fact that the Court instructed the jury that all such testimony came from a polluted source. The witness Whitney had testified to his conversations with Rossi, and they were competent to show that Rossi was a member of the conspiracy. The jury could not possibly have been confused by reason of the fact that the Court instructed the jury that such testimony was to be carefully scrutinized.

C. The next assignment of errors covers the admission of the Exhibit No. 46. (Tr. 60). The defendants were charged with a conspiracy to sell intoxicating liquor and it was competent to show that they were connected with various other bootlegging places be-

sides the Monte Carlo as there was no specific charge in the indictment that they found the evidence in the Monte Carlo cache. From examination of Exhibit No. 46, the Court can see the nature of the same which shows very plainly on its face that certain amounts of money were being collected from those places, and it also shows that a number of the places had been scratched off, and Mr. Whitney testified that those places had only recently been raided and closed down, and the defendant Rossi had stated that Gatt would have such a list on his person, which would show the places he was doing business with. There was plainly no error in the admission of such testimony in the face of Mr. Whitney's explanation of them, found on page sixty (60), sixty-one (61) and sixty-eight (68) of the transcript.

D. There was no error upon the grounds predicated by the defendants on page nineteen (19) of their brief for the reason that it was perfectly permissable to show that the defendants had been convicted of the possession of intoxicating liquor in 1923. (*U. S. vs. Merrill*, 6 Fed. 2nd, 120, 9th C. C. A.) Consequently, the remarks made by counsel for the Government could have in no wise prejudiced the defendants in any way.

The other remarks, found on page twenty (20) of the plaintiff in error's brief were not prejudicial inasmuch as the Court instructed the jury to disregard any such remarks. (Tr. 82 and 83). Counsel has not seen fit to set out the fact that the Court instructed the jury to disregard such remarks. In the *Fontanello* case (*Fontanello vs. United States*, No. 5045, 19 Fed. 2nd, 921), the Court had not so instructed the jury and there was a great deal more said which would tend to inflame the jury than in the present case. The last matter mentioned on page twenty (20) and stated by the Assistant United States Attorney, was clearly proper and within the confines of an argument upon the facts, because the jury was asked to so consider it by the language, "* * * and you find the evidence so warrants in this case * * *."

It is respectfully urged that there was no error committed in this case.

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